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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-720

IN THE MATTER OF THE CONTEMPT OF

ESTHER S. FRANKEL,

AN ATTORNEY AT LAW OF THE STATE OF NEW JERSEY,

Petitioner.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

BRIEF FOR RESPONDENT IN OPPOSITION

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TABLE OF CONTENTS

	PAGE
COUNTER-STATEMENT OF THE CASE	1
POINT I—Petitioner's claim that her actions were justified because the New Jersey assignment system is unconstitutional is not properly reviewable on an appeal from a judgment of contempt because she could have obtained orderly judicial review of that question without contemning herself	2
POINT II—Powell v. Alabama, 287 U. S. 45 (1932) indicates that no constitutional restraint prohibits the assignment of counsel without compensation	5
CONCLUSION	8

Cases Cited

Argersinger v. Hamlin, —— U. S. ——, 92 S. Ct. 2006 (1972)	6
Carton, Contempt of, In re, 48 N. J. 9, 222 A. 2d 92 (1966)	3, 4
Powell v. Alabama, 287 U. S. 45 (1932)	5
Rodriguez v. Rosenblatt, 58 N. J. 281, 277 A. 2d 216 (1971)	6, 7
State v. Clifton, 247 La. 495, 172 So. 2d 657 (Sup. Ct. 1965)	6
State v. Horton, 34 N. J. 518, 170 A. 2d 1 (1961)	4
State in Interest of Anthony Antini, Jr., 53 N. J. 488, 251 A. 2d 122 (1969)	2, 4, 7
State v. Rush, 46 N. J. 399, 217 A. 2d 441 (1966)	4-7

PAGE

Steenback, In re, 34 N. J. 89, 167 A. 2d 397 (1961).... 4

Teine, In re, 17 N. J. 170, 110 A. 2d 93 (1954)..... 3

United States v. Dillon, 346 F. 2d 633 (9 Cir. 1965), cert. den., 382 U. S. 978 (1966)..... 6

Walker v. City of Birmingham, 388 U. S. 307 (1967) 3

United States Constitution Cited

First Amendment 5

Fifth Amendment 5

Thirteenth Amendment 5

Fourteenth Amendment 5

Statutes Cited

N.J.S.A. 2A:10-1(c) 2

N.J.S.A. 2A:158A-1, L. 1967, c. 43 7

Rules Cited

R. 1:10-1 2

R. 3:27-2 2

Other Authority Cited

Annotation:

12 A.L.R. 2d 1059, 1107-1114 (1950)..... 3

IN THE

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OCTOBER TERM, 1972

No. 72-729

IN THE MATTER OF THE CONTEMPT OF

ESTHER S. FRANKEL,

AN ATTORNEY AT LAW OF THE STATE OF NEW JERSEY,

Petitioner.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

BRIEF FOR RESPONDENT IN OPPOSITION

Counter-Statement of the Case*

On July 6, 1971 Janet Corey, an indigent, was charged with a disorderly persons offense in the Paterson, New Jersey Municipal Court. The court assigned the petition-

* The above facts can be found in Petitioner's Appendix, p. 6 (Pa6).

er, Esther Frankel, an attorney of the State of New Jersey, to represent the defendant (Pa6).

Miss Frankel refused the assignment. The court gave her 24 hours to reconsider her position, warning her that it would hold her in contempt of court if she did not change it (Pa6). Miss Frankel stated that she was doing it as a matter of principle and that she would waive any waiting period for the imposition of judgment and sentence by the court (Pa6). She conceded that she had been fully advised of her rights by the court. The court imposed a fifty dollar fine for contempt of court pursuant to N.J.S.A. 2A:10-1(c) and R. 1:10-1 of the New Jersey Court Rules.

POINT I

Petitioner's claim that her actions were justified because the New Jersey assignment system is unconstitutional is not properly reviewable on an appeal from a judgment of contempt because she could have obtained orderly judicial review of that question without contemning herself.

The petition before this Court is directed toward an ultimate decision invalidating the New Jersey assignment system which requires attorneys to represent without compensation indigents accused of non-indictable offenses. New Jersey Court Rules, R. 3:27-2; see *State in Interest of Anthony Antini, Jr.*, 53 N. J. 488, 495, 251 A. 2d 122 (1969). Petitioner claims that her refusal to accept the assignment in the instant case was justified because the assignment system is unconstitutional.

The courts have consistently held that on an appeal from a contempt conviction, a contemnor cannot assert

that the order he violated was based on error of fact or law as long as it was issued by a court of competent jurisdiction. *Walker* v. *City of Birmingham*, 388 U. S. 307, 317-321 (1967); *In re Teine*, 17 N. J. 170, 177, 110 A. 2d 93 (1954); *In re Contempt of Carton*, 48 N. J. 9, 16, 222 A. 2d 92 (1966). See also *Annot.*, 12 A.L.R. 2d 1059, 1107-1114 (1950) which sets down the general rule at 1107:

> "It is almost unanimously agreed that if the defendant desires to attack the order or the decree as erroneous, he must do so, not by disregarding or violating it and then setting the error up as a defense to a charge of contempt, but by a direct attack thereon by appeal or a motion to set it aside."

In *Walker* v. *City of Birmingham*, *supra*, defendants appealed state contempt convictions arising out of a refusal to obey a court injunction against mass demonstrations. The injunction was based upon a Birmingham parade ordinance. Defendants contended that it was permissible to disobey the court's order because both the ordinance and the injunction itself were unconstitutionally vague.

The Alabama courts said that they would not entertain the attack on the constitutionality of the ordinance and injunction since the defendants could have properly raised those issues by a motion to dissolve the injunction.

The Supreme Court agreed, noting that the defendants were bound to pursue orderly judicial review instead of disobeying the injunction:

> "The rule of law that Alabama followed in this case reflects a belief that in the fair administration of justice no man can be a judge in his own case however exalted his station, however righteous his motives, and irrespective of his race, color, politics,

> or religion. This court cannot hold that the petitioners were constitutionally free to ignore all the procedures of the law and carry their battle to the streets. One may sympathize with the petitioners' impatient commitment to their cause. But respect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom."

The judgment of contempt was upheld by the Supreme Court.

In *In re Contempt of Carton*, *supra* at 16, the court said of a lawyer's contempt:

> ". . . There must be no defiance of a court, least of all by one of its officers. It is no excuse that the trial judge may be in error. Courts of appeal exist to hear such claims. One who is dissatisfied with the action of a court must obtain a stay or obey the order. He may not ignore it."

The above rationale applies to the instant case. Petitioner openly defied a court command and on appeal attacks the validity of the court's order. She could have gotten an orderly review of her contentions by obeying the court order and subsequently applying to the trial court for compensation for her services. She then could have appealed a denial of her application. Indeed, this has been the traditional practice in this State followed by attorneys seeking compensation for their services. See *State in Interest of Anthony Antini, Jr.*, *supra*; *State* v. *Rush*, 46 N. J. 399, 217 A. 2d 441 (1966); *In re Steenback*, 34 N. J. 89, 167 A. 2d 397 (1961); *State* v. *Horton*, 34 N. J. 518, 170 A. 2d 1 (1961).

Under the general rule stated herein, petitioner cannot now rely upon the alleged constitutional issue concerning the impropriety of the assignment system in New Jersey. Therefore, there is no reason for this Court to grant her relief.

POINT II

Powell v. _Alabama_, 287 U. S. 45 (1932) indicates that no constitutional restraint prohibits the assignment of counsel without compensation.

Petitioner claims that the assignment system violates an attorney's rights against involuntary servitude under the *United States Constitution*, 13th Amendment and unequal treatment under the *United States Constitution*, 14th Amendment; and takes private property without compensation for public use contrary to the *United States Constitution*, Fifth Amendment. It is also alleged that the First Amendment right to dissent has been stifled by the assignment system.

Most of these claims were expressly rejected in *State* v. *Rush*, *supra* at 407-408. Answering the constitutional claims posed by the attorney in Rush, the court said:

> "None of these contentions is new, and if one accepts the premise that the duty to defend the poor is a professional obligation rationally incidental to the right accorded a small segment of the citizenry to practice law, these claims fall away."

Analyzing *Powell* v. *State of Alabama*, 287 U. S. 45 (1932), which underscored the duty of attorneys to represent indigents, the court in *Rush* noted that, "*Powell* did assume that, if attorneys as officers of the Court were

called to serve without pay, no constitutional restraint stood in the way." *State* v. *Rush, supra* at 408.

Thus, decisions of both the United States Supreme Court and the New Jersey Supreme Court directly contravene the defendant's constitutional claims. See also *United States* v. *Dillon*, 346 F. 2d 633 (9 Cir. 1965), *cert. den.* 382 U. S. 978 (1966) and *State* v. *Clifton*, 247 La. 495, 172 So. 2d 657, 667 (Sup. Ct. 1965).

In *Rodriguez* v. *Rosenblatt*, 58 N. J. 281, 295, 277 A. 2d 216 (1971) the New Jersey Supreme Court held that, as a matter of fairness, an indigent charged with a non-indictable offense is entitled to assigned counsel when a conviction would result in imprisonment in fact or other "consequence of magnitude."

The court in *Rodriguez* stated:

> "Our municipal court judges have had and continue to have broad discretion to assign free counsel to indigent defendants wherever justice so requires." 58 N. J. at 295.

No provision for compensating counsel was made in the opinion. It is obvious that if the court had wanted to relieve the attorney of his already existing duty to render free services in the municipal courts, it would have done so in the opinion. Since it did not, the traditional obligation of lawyers continued to exist when defendant refused to accept her assignment.

The court's decision in *Rodriguez* anticipated this Court's opinion in *Argersinger* v. *Hamlin*, —— U. S. ——, 92 S. Ct. 2006 (1972). Nothing in the latter opinion indicates that an attorney's constitutional rights are violated by state procedures for assigning counsel without compensation. In fact, it is noted in the concurring

opinion of Mr. Justices Rhenquist and Powell at 2022, n. 21, that compensation for counsel is often inadequate. The Court did not suggest, however, that this was of constitutional import.

In *State* v. *Rush*, *supra* it was noted that the burden on the bar could reach such dimensions as to violate due process, but such an extraordinary stage had not yet been reached. At that time (1966) the system of assignment without compensation applied to crimes, juvenile offenses and non-indictable offenses. The Public Defender statute, N.J.S.A. 2A:158A-1 *et seq.*, L. 1967, c. 43, has since provided for public representation in the area of crimes. *State in Interest of Anthony Antini, Jr., supra*, provides for compensation for attorneys assigned to represent indigent juvenile offenders where imprisonment likely would follow conviction. Therefore, a great deal of the burden which existed at the time of *Rush* has now been lifted from the bar. If the due process argument was not viable then, it certainly is not now.

It is undoubtedly true that the number of assignments in non-indictable offenses will increase as a result of the *Rodriguez* opinion. However, there has been no demonstration that at this point the increase has so burdened the bar as to give the due process argument vitality. Surely, if the New Jersey Supreme Court had felt so, it would have provided for compensation to attorneys in the *Rodriguez* case or by administrative directive. As noted in Petitioner's brief the Administrative Director of the Courts of New Jersey explicitly stated that the *Rodriguez* decision did not require or authorize such compensation (Pa18).

CONCLUSION

A contemnor may not argue on appeal that the order contemned was based on error in fact or law. He must seek orderly judicial review of that order without disobedience. Therefore, the State of New Jersey contends that the constitutionality of the assignment system in New Jersey is not properly before this Court on review.

Furthermore, this Court has indicated that no constitutional restraint proscribes the assignment of lawyers, as officers of the court, to represent indigents without being recompensed.

For the above reasons, we respectfully request this Court to deny Petitioner's application for a writ of *certiorari*.

Respectfully submitted,

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